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21 UNITED STATES DISTRICT COURT
22 NORTHERN DISTRICT OF CALIFORNIA

23 IN RE KALOBIOS
24 PHARMACEUTICALS, INC.
25 SECURITIES LITIGATION

Case No. 5:15-cv-05841-EJD

CLASS ACTION

26 THIS DOCUMENT RELATES TO
27 ALL ACTIONS

**PLAINTIFFS' NOTICE OF MOTION
AND MOTION FOR AWARD OF
ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES,
AND COMPENSATORY AWARDS
FOR PLAINTIFFS; MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: August 2, 2018

Time: 9:00 a.m.

Ctrm: 4, 5th Floor

Judge: Hon. Edward J. Davila

**NOTICE OF MOTION AND MOTION FOR AN AWARD OF ATTORNEYS' FEES,
REIMBURSEMENT OF EXPENSES, AND COMPENSATORY AWARDS**

PLEASE TAKE NOTICE that, pursuant to the Court's April 2, 2018 Amended Order Granting Preliminary Approval of Settlement (Dkt. No. 129) ("Preliminary Approval Order"), on August 2, 2018 at 9:00 a.m., at the United States Court, Northern District of California, Courtroom 4, 5th Floor, San Jose Courthouse, 280 South 1st Street, San Jose, California 95113, before the Honorable Edward J. Davila, Lead Plaintiffs Kaniz Fatema, Zeke Ingram, Bhaskar R. Gudlavenkatasiva, and Abuhena M. Saifulislam and Plaintiff Austin Isensee (altogether, "Plaintiffs") will move for an order awarding attorneys' fees and authorizing reimbursement of expenses, payable to Lead Counsel for distribution, in Lead Counsel's discretion, among Lead Counsel and other Plaintiffs' Counsel, and for compensatory awards to the Plaintiffs.¹

The requested award of attorneys' fees, reimbursement of expenses, and Plaintiff compensatory awards are warranted under the criteria applicable to common fund and PSLRA settlements. This Motion is supported by the papers submitted herewith, including: Plaintiffs' Memorandum of Points and Authorities, *infra*; the Declaration of Matthew L. Tuccillo, Esq. ("Tuccillo Dec.") and supporting exhibits; the Declaration of Lionel Z. Glancy, Esq. ("Glancy Dec.") and supporting exhibits; the Declaration of William B. Federman, Esq. ("Federman Dec.") and supporting exhibits; Declaration of Sarah Evans ("Evans Dec.") and supporting exhibits; the Declarations of Kaniz Fatema ("Fatema Dec."), Zeke Ingram ("Ingram Dec."), Bhaskar R. Gudlavenkatasiva ("Gudlavenkatasiva Dec."), Abuhena M. Saifulislam ("Saifulislam Dec."), and Austin Isensee ("Isensee Dec."); the Stipulation and Agreement of Settlement dated March 21, 2018 (Dkt. No. 125-1) ("Stipulation") and its exhibits; the other filings in this Action; and such other and further representations as Lead Counsel may make during the hearing on this matter.

¹ Along with Lead Counsel Pomerantz LLP ("Pomerantz" or "Lead Counsel"), the other Plaintiffs' counsel that worked on this matter, under the supervision of Lead Counsel, were Glancy Prongay & Murray LLP ("Glancy") and Federman & Sherwood ("Federman"). Together, Lead Counsel, Glancy, and Federman are referred to herein as "Counsel" or "Plaintiffs' Counsel."

STATEMENT OF ISSUES TO BE DECIDED

1. Whether Lead Counsel's request for an award of attorneys' fees and expenses, payable to Lead Counsel from the settlement fund for distribution in Lead Counsel's discretion among Plaintiffs' Counsel, should be granted.

2. Whether Plaintiffs' Counsel's expenses were reasonable and necessarily incurred to achieve the benefit obtained and should be reimbursed from the settlement fund.

3. Whether Plaintiffs' requests for \$500.00 each (\$2,500.00 total) in reimbursement for their time, costs, and expenses directly relating to their representation of the Settlement Class should be granted and paid from the settlement fund.

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20	Richard Posner, <i>Economic Analysis of Law</i> , § 21.9 (3d ed. 1986)	10
21	NERA Economic Consulting, <i>Recent Trends in Securities Class Action Litigation:</i>	
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MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Fed. R. Civ. P. 23(e), Plaintiffs, individually and on behalf of all other Settlement Class Members, respectfully move this Court for an Order awarding the following: (1) 25% of the \$1,500,000.00 Settlement Fund as attorneys' fees, or attorneys' fees of \$375,000.00; (2) reimbursement of \$19,041.70 in reasonable and necessary expenses incurred in prosecuting this Action; and (3) compensatory awards of \$500.00 for each Plaintiff, or \$2,500.00 in total.²

I. INTRODUCTION

Under the direction of Lead Counsel Pomerantz LLP, all Plaintiffs' Counsel undertook the prosecution of this Action on a wholly contingency-fee basis, and since the litigation's inception, have spent 1,757.05 hours in the aggregate, worth a total of \$1,176,579.50 in lodestar, while fronting out-of-pocket expenses totaling \$45,165.72. Their efforts resulted in the present Settlement of \$1,500,000.00 in cash to resolve all remaining claims in this Action as to the last remaining Defendant, Martin Shkreli ("Shkreli"). This Settlement is in addition to the previous partial settlement (the "Partial Settlement") of \$1,500,000.00 in cash plus 300,000 shares in the reorganized, post-bankruptcy-exit company secured from Defendants KaloBios Pharmaceuticals, Inc. ("KaloBios"), Ronald Martell, and Herb Cross, which this Court approved on July 24, 2017 in a Revised Order and Final Judgment (Dkt. No. 101) ("First Final Approval Order"). Altogether, both settlements represent an aggregate gross recovery of \$3,254,722.73 (inclusive of \$254,722.73 in proceeds from the sale of the 300,000 shares from the prior partial settlement). This total recovery represents 16.3% of the \$20 million proof of claim that Plaintiffs filed in KaloBios's bankruptcy, an outstanding recovery rate given the substantial recoverability risks posed by both company's bankruptcy and Shkreli's criminal conviction.

In its First Final Approval Order approving the Partial Settlement, the Court awarded attorneys' fees of \$375,000.00 plus 75,000 company shares (later sold for \$63,680.68), granted

² Unless otherwise stated, all capitalized terms used herein have the same definitions as assigned in the Stipulation and Agreement of Settlement, dated March 21, 2018 (Docket ("Dkt.") No. 125-1) ("Stipulation"). All "Dkt." references are to the docket in *In re KaloBios Pharmaceuticals, Inc.*, No. 5:15-cv-05841-EJD (N.D. Cal.) ("Action").

1 reimbursement of \$26,124.02 in expenses, and awarded the Plaintiffs \$500 apiece in compensation
 2 for their work on the litigation to that point.

3 However, the litigation against Defendant Shkreli continued, including, *inter alia*, the
 4 preparation and filing of multiple amended complaints, the briefing of multiple motions to dismiss
 5 and the conduct of oral argument on one of them, and the conduct of a mediation session with an
 6 experienced mediator. Plaintiffs' Counsel have incurred a total of 596.5 hours in previously
 7 unreported, additional time, worth a total of \$377,634.50 in lodestar, while fronting additional,
 8 previously unreported, out-of-pocket expenses totaling \$19,041.70. For that reason, Plaintiffs and
 9 Lead Counsel are pursuing this Motion. As reasonable additional compensation, Lead Counsel
 10 respectfully requests an award of 25% of the current \$1.5 million Settlement Fund, or \$375,000 in
 11 attorneys' fees. This award is within the typical range for similar cases in the Ninth Circuit and
 12 represents the benchmark often invoked. The lode-star cross-check also supports the award, as a
 13 negative multiplier results either when the post-Partial-Settlement-only lodestar (\$377,634.50) is
 14 compared against the currently-requested \$375,000 award or when the total aggregate lodestar to
 15 date (\$1,176,579.50) is compared against the total fee awards from both settlements assuming this
 16 Fee Motion is granted (\$813,680.68). Lead Counsel also respectfully requests reimbursement of
 17 those out-of-pocket expenses as-yet unsubmitted and unreimbursed, totaling \$19,041.70, much of
 18 which were the costs of the mediation with Defendant Shkreli and all of which were reasonable,
 19 necessary, and the kind of expenses regularly reimbursed by courts. Plaintiffs also seek
 20 supplemental compensatory awards of \$500 each (\$2,500 total) for their personal time and effort
 21 dedicated to prosecuting and resolving this Action against Defendant Shkreli.

22 Pursuant to the Court's Preliminary Approval Order, copies of the Court-approved Short-
 23 Form Notice were sent to 21,491 potential Settlement Class Members and nominees directing
 24 recipients to the Claims Administrator's website, which posted the Long-Form Notice disclosing
 25 that Lead Counsel would seek an award of 25% of the Settlement Fund in attorneys' fees, litigation
 26 expenses not to exceed \$50,000 (significantly higher than the actual request), and Plaintiff
 27 compensatory awards of \$500 each. *See* Evans Dec. ¶¶7, 10. To date, zero Settlement Class
 28 Members objected to any of these requests or sought to be excluded from the Settlement. This
 MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND COMPENSATORY
 AWARDS FOR PLAINTIFFS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF
 – Case No. 5:15-cv-05841-EJD

1 favorable response by the Settlement Class also strongly supports the reasonableness of the
2 requested attorneys' fee award, reimbursement of expenses, and Plaintiff compensatory awards.

3 For all these reasons, as discussed in greater detail below, Plaintiffs and Lead Counsel
4 respectfully request that the Court grant this Motion.

5 **II. BACKGROUND**

6 **A. Factual Allegations, Procedural History, And Settlement Negotiations**

7 A recitation of relevant facts, procedural history, and the settlement process is detailed in
8 Plaintiffs' Memorandum in support of final approval of the Settlement, filed concurrently herewith
9 ("Final Approval Memo") and the accompanying Tuccillo Dec. *See* Final Approval Memo, at 1-4;
10 Tuccillo Dec. ¶¶4-18, 24.

11 **B. Lead Counsel's Specific Efforts**

12 To successfully prosecute this Action to the point of the Settlement, Lead Counsel expended
13 substantial time and resources on the following necessary steps, among others:

- 14 • Analyzing KaloBios's public filings, annual reports, press releases, transcripts of earnings
15 calls and industry and investment conferences, and other public statements;
- 16 • Collecting and reviewing a comprehensive compilation of analyst reports and major
17 financial news service reports on KaloBios;
- 18 • Reviewing and analyzing stock trading data relating to KaloBios;
- 19 • Investigating Shkreli's practices and histories at previous companies;
- 20 • Analyzing the indictments and SEC complaints against Defendant Shkreli regarding his
21 allegedly fraudulent conduct at his prior business ventures;
- 22 • Monitoring news coverage and reviewing and analyzing trial transcripts, witness statements,
23 and other evidence presented during Shkreli's criminal trial;
- 24 • Hiring a private investigator to locate and interview numerous confidential witnesses with
25 knowledge of the events relevant to the allegations in the Action;
- 26 • Analyzing the law applicable to the parties' claims and defenses;
- 27 • Drafting initial and multiple amended complaints;
- 28 • Briefing multiple motions to dismiss and presenting oral argument on one of them;
- Consulting with a damages consultant in the areas of loss causation, market efficiency, and
damages;

- Participating in a mediation session with Shkreli's counsel, including preparing and submitting a detailed mediation statement;
- Negotiating and memorializing the terms of the MOU;
- Negotiating and memorializing the terms of the Stipulation and its exhibits;
- Preparing the Settlement motion papers and related documents necessary to provide notice of the Settlement to Settlement Class Members and to obtain preliminary and final approval of the Settlement;
- Obtaining competing bids for claims-administration work related to the Settlement before selecting the most competitive bidder to serve as Claims Administrator;
- Securing the services of the Escrow Agent, executing a contract for such service, and creating the Settlement Escrow Account;
- Participating in approval hearings regarding the sufficiency of the Settlement; and
- Handling inquiries from Settlement Class Members regarding the Settlement.

See Tuccillo Dec. ¶24.

III. ARGUMENT

A. Reasonable Percentage Of The "Common Fund" Recovered Is An Appropriate Approach To Awarding Attorneys' Fees

It is well-settled that "a private plaintiff, or his attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Vincent v. Hughes Air W., Inc.*, 557 F.2d 759, 769 (9th Cir. 1977); *see also Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) ("[The Supreme Court] has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole."). The PSLRA, the Federal Rules of Civil Procedure, and Ninth Circuit precedent all contemplate an award of "reasonable" attorneys' fees. *See* 15 U.S.C. § 78u-4(b); Fed. R. Civ. P. 23(h); *In re Heritage Bond Litig.*, 233 F. App'x 627, 631 (9th Cir. 2007).

Binding precedent clearly supports Plaintiffs' request for a percentage of the settlement fund. In *Blum v. Stenson*, the Supreme Court recognized that under the "common fund doctrine[,] a reasonable fee may be based "on a percentage of the fund bestowed on the class." 465 U.S. 886, 900 n.16 (1984). The doctrine's intent is that "those who benefit from the creation of a fund should

1 share the wealth with the lawyers whose skill and effort helped create it.” *In re Wash. Pub. Power*
 2 *Supply Sys. Sec. Litig.* (“WPPSS”), 19 F.3d 1291, 1300 (9th Cir. 1994).

3 While courts in the Ninth Circuit have discretion to choose whether to use either the
 4 percentage-of-the-fund or the lodestar-plus-a-risk-multiplier method to determine whether a request
 5 for attorneys’ fees is reasonable, courts in this district often prefer a percentage-of-the-fund
 6 approach in common-fund cases. *See, e.g., In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935,
 7 942 (9th Cir. 2011) (“Because the benefit to the class is easily quantified in common fund settlements,
 8 we have allowed courts to award attorneys a percentage of the common fund in lieu of the often more
 9 time-consuming task of calculating the lodestar.”); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047
 10 (9th Cir. 2002). *See also Paul, Johnson, Alston & Hunt v. Graulity*, 886 F.2d 268 (9th Cir. 1989);
 11 *Six (6) Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1311 (9th Cir. 1990); *Torrissi v.*
 12 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993). Indeed, use of the percentage method
 13 “appears to be dominant.” *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal.
 14 2008); *see also In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989) (use of the
 15 percentage method decreases burden on courts by eliminating full-blown, time-consuming
 16 “lodestar” analyses, while assuring beneficiaries do not experience undue delay in receiving their
 17 share of the settlement).

18 It is also well-established that using the percentage method is proper in securities-fraud
 19 cases. The plain language of the PSLRA states that class counsel is entitled to attorneys’ fees that
 20 represent a “reasonable percentage” of the damages recovered by the class. *See* 15 U.S.C.A. § 78u-
 21 4(a)(6); 15 U.S.C.A. § 77z-1(a)(6). “By using this language, ‘Congress plainly contemplated that
 22 percentage-of-recovery would be the primary measure of attorneys’ fees awards in federal securities
 23 class actions.’” *In re Am. Apparel, Inc. S’holder Litig.*, No. 10-cv-06352-MMM-JCGx, 2014 WL
 24 10212865, at *20 (C.D. Cal. July 28, 2014) (quoting *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d
 25 570, 586 (S.D.N.Y. 2008)); *see also In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 300 (3d Cir.
 26 2005), *as amended* (Feb. 25, 2005) (“Consistent with past jurisprudence, the percentage-of-recovery
 27 method was incorporated in the Private Securities Litigation Reform Act of 1995.”).

1 In addition to providing just compensation, awards of attorneys' fees from a common fund
 2 also serve to encourage skilled counsel to represent those who seek redress for damages inflicted on
 3 entire classes of persons and to discourage future similar misconduct. Indeed, the Supreme Court
 4 has emphasized that private securities actions, such as the instant Action, are an effective weapon
 5 in the enforcement of the securities laws. *See generally, Bateman Eichler, Hill Richards, Inc., v.*
 6 *Berner*, 472 U.S. 299, 310 (1985); *see also Tellabs, Inc., v. Makor Issues & Rights, Ltd.*, 551 U.S.
 7 308, 313 (2007) ("This Court has long recognized that meritorious private actions to enforce federal
 8 antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement
 9 actions brought, respectively, by the Department of Justice and the [SEC]").

10 **B. The Ninth Circuit's 25% Benchmark Award Is Reasonable In This Action**

11 The instant request for 25% of the \$1,500,000.00 Settlement Fund, or \$375,000.00, is clearly
 12 within the range of attorneys' fees awarded under similar circumstances and is within the range of
 13 fees awarded in this District. The typical range of attorneys' fees in the Ninth Circuit is 20% to
 14 33^{1/3}% of the total settlement value, with 25% considered the benchmark. *Powers v. Eichen*, 229
 15 F.3d 1249, 1256 (9th Cir. 2000); *see also Bluetooth*, 654 F.3d at 943 (reaffirming 25% benchmark
 16 in a common fund case). However, while this Circuit considers 25% to be a benchmark for fee
 17 awards, in "most common fund cases, the award exceeds that benchmark." *Knight v. Red Door*
 18 *Salons, Inc.*, No. 08-01520 SC, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009); *see also Activision*,
 19 723 F. Supp. at 1377-78 ("[N]early all common fund awards range around 30%.").

20 Courts "may adjust [the 25% benchmark] figure upwards or downwards if the record shows
 21 special circumstances justifying a departure." *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245,
 22 260 (N.D. Cal. 2015) (internal citations and quotations omitted). Relevant factors in assessing
 23 whether the requested percentage of the fee is appropriate include, *inter alia*: (1) the results for the
 24 class; (2) the risks for its counsel, (3) whether the fee is within the range typically associated with
 25 cases of this kind; (4) the burden on plaintiffs' counsel of prosecuting the case; and (5) the difficulty
 26 of the questions presented. *See Vizcaino*, 290 F.3d at 1048-50.

27 Here, the requested fee percentage is reasonable, considering the relevant factors in the Ninth
 28 Circuit and a lodestar cross-check. Lead Counsel aggressively prosecuted this Action with no
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1 guarantee of receiving any remuneration and with full awareness of the potential difficulties of
 2 obtaining a recovery from a company in bankruptcy and a primary individual defendant facing
 3 criminal charges on which he was later convicted. *See* Tuccillo Dec. ¶25. Throughout this litigation,
 4 Lead Counsel has been aware of the numerous risks presented by this Action against Shkreli,
 5 including difficulties in satisfying the PSLRA's heightened pleading standards for securities-fraud
 6 claims, surviving a motion to dismiss, achieving class certification, obtaining discovery given the
 7 incarceration of Shkreli and his corporate lawyer, surviving summary judgment, and winning at trial
 8 and on appeal. Even if those difficulties were surmounted, there was still a large recoverability risk,
 9 due to Shkreli's limited insurance coverage, his rapidly evaporating personal resources, and his
 10 incarceration following his criminal conviction. *See* Tuccillo Dec. ¶13. Despite these challenges,
 11 Plaintiffs' Counsel expended over 1,757.05 hours in professional services, worth \$1,176,579.50 in
 12 lodestar, and incurred over \$45,165.72 in out-of-pocket expenses. *See* Tuccillo Dec., ¶¶26, 30;
 13 Glancy Dec., ¶¶4, 8; Federman Dec., ¶¶4, 8.

14 **1. Lead Counsel Achieved A Favorable Result For The Settlement Class**

15 The result achieved is an important factor to be considered in making a fee award. *See*
 16 *Vizcaino*, 290 F.3d at 1048; *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1175 (S.D.
 17 Cal. 2007). Here, the two settlements achieved for the Class totaled \$3,254,722.73, which represents
 18 a return of approximately 16.3% of total *possible* damages recoverable, based on the \$20 million
 19 class-wide proof of claim that Plaintiffs filed in KaloBios's bankruptcy proceeding, No. 15-12628
 20 (LSS) in the U.S. Bankruptcy Court for the District of Delaware.

21 This recovery is *notably larger* than comparable securities-class-action-settlement
 22 recoveries as a percentage of estimated damages. For example, the median recovery in settlements
 23 of securities class actions with damages estimated to be between \$20 million and \$49 million was
 24 8.4% for the period 1996 to 2017. *See* Tuccillo Dec., Exh. 5, NERA Economic Consulting, *Recent*
 25 *Trends in Securities Class Action Litigation: 2017 Full-Year Review* (Jan. 29, 2018), at 37. Indeed,
 26 courts in the Ninth Circuit have recognized that recoveries of *less than 10%* of estimated damages
 27 are normal for securities class actions. *See Omnivision*, 559 F. Supp. 2d at 1042 (noting that the
 28 average recovery in securities class actions is less than 3% of possible damages and approving
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1 settlement representing 6% of recoverable maximum damages); *In re Heritage Bond Litig.*, No. 02-
 2 ML-1475 DT, 2005 WL 1594403, at *8-*9 (C.D. Cal. June 10, 2005) (recognizing average recovery
 3 of between 2% to 3% of maximum damages).

4 Notably, the combined settlements are roughly 16.3% of total potential damages (nearly
 5 twice the median observed in the two-decade NERA study), the recovery of which was *entirely*
 6 dependent on Plaintiffs' ability to survive Shkreli's second motion to dismiss, certify the class in its
 7 entirety, conduct discovery with Shkreli and his corporate lawyer incarcerated, successfully defend
 8 against summary judgment, prevail on all of their claims against Shkreli at trial and on appeal, prove
 9 entitlement to 100% of the estimated total damages, and then collect from Shkreli who, according
 10 to his criminal trial counsel, "doesn't have any cash," has no bank accounts, and has a net worth
 11 comprised mostly of an illiquid stake in a privately-held company. *See* SAC ¶52(c). By resolving
 12 this Action against Shkreli at this juncture, Lead Counsel was able to secure a certain and substantial
 13 recovery for the Settlement Class, while avoiding the aforementioned risks. Under any measure,
 14 this result is noteworthy and supports the requested fee award.

15 Indeed, fees representing a higher percentage than that requested here have been awarded by
 16 courts within the Ninth Circuit in comparably sized securities-class-action settlements. *See, e.g., In*
 17 *re Pac. Enters. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (fee award equal to 33% of \$12 million
 18 settlement fund); *Craft v. Cty. of San Bernardino*, 624 F. Supp. 2d 1113, 1127 (C.D. Cal. 2008)
 19 ("Cases of under \$10 million will often result in fees *above* 25%.") (emphasis added); *Patel v.*
 20 *Axesstel, Inc.*, No. 14-CV-1037-CAB-BGS, 2015 WL 6458073, at *8 (S.D. Cal. Oct. 23, 2015)
 21 (awarding 30% fees in a securities class action, where settlement fund was \$1.25 million); *Bond v.*
 22 *Ferguson Enters., Inc.*, No. 09-cv-1662 OWW MJS, 2011 WL 2648879, at *15 (E.D. Cal. June 30,
 23 2011) (awarding fees of 30% of common fund of \$2.25 million); *see also Van Vranken v. Atl.*
 24 *Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995) (finding that higher percentages, including
 25 between 30-50 percent of the fund, tend to be awarded when the funds are less than \$10 million)
 26 (collecting cases).

2. This Action Entailed Significant Risks

That Lead Counsel undertook this litigation with substantial risk of no recovery is a significant factor in the award of fees. *See Omnivision*, 559 F. Supp. 2d at 1047; *WPPSS*, 19 F.3d at 1299-1301. This is an important factor in determining the attorneys' percentage fee award. *See Vizcaino*, 290 F.3d at 1048-49 (that the case is "fraught with risk and recovery was far from certain" is "a relevant circumstance" that courts must take into account when awarding fees).

Courts have long recognized that the risk of no recovery is substantially increased in securities class actions, which are notoriously complex and difficult to both plead and prove. *See In re Heritage Bond Litig.*, No. 02-ML-1475-DT, 2005 WL 1594389, at *6 (C.D. Cal. June 10, 2005) (emphasizing that class actions, and particularly securities class actions, typically involve substantial complexity); *In re BP p.l.c. Sec. Litig.*, 852 F. Supp. 2d 767, 820 (S.D. Tex. 2012) ("[F]ederal legislation and authoritative precedents have created for plaintiffs in all securities actions formidable challenges to successful pleading."); *In re Ikon Office Solutions, Inc. Sec. Litig.*, 194 F.R.D. 166, 194 (E.D. Pa. 2000) (noting that "securities actions have become more difficult from a plaintiff's perspective in the wake of the PSLRA"); *In re Flag Telecom Holdings, Ltd. Sec. Litig.*, No. 02-cv-3400 (CM) (PED), 2010 WL 4537550, at *27 (S.D.N.Y. Nov. 8, 2010) (recognizing that securities class litigation is "notably difficult and notoriously uncertain") (internal citation omitted).

This litigation was no different. As detailed herein and in the accompanying Final Approval Brief and supporting declaration, this Action involved difficult and complex legal and factual matters. Lead Counsel navigated the challenging terrain of the PSLRA by engaging in a thorough investigation of potential claims on behalf of KaloBios's investors. Lead Counsel then prepared and filed highly detailed and particularized initial and amended complaints. In response, Shkreli adamantly maintained that he had no liability, arguing that he never made a material misrepresentation, that the truth was on the market, that Plaintiffs did not sufficiently allege and would not be able to prove fraudulent intent, and that Plaintiffs would be unable to show they had any recoverable damages. *See, e.g.*, Shkreli's Motion to Dismiss the FAC, dated August 16, 2016 (Dkt. No. 61) ("First MTD"), at 16-25; Shkreli's Motion to Dismiss the SAC, dated September 29, 2017 (Dkt. No. 107) ("Second MTD"), at 20-25. Had this Action progressed to a determination of MOTION FOR AWARD OF ATTORNEYS' FEES, REIMBURSEMENT OF EXPENSES, AND COMPENSATORY AWARDS FOR PLAINTIFFS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Shkreli's then-pending motion to dismiss, it is far from certain that the Court would have accepted Plaintiffs' allegations and legal theories over Shkreli's defenses, especially considering that the Court granted Shkreli's first motion to dismiss. *See* Dkt. No. 94. Even if they survived Shkreli's second motion to dismiss, Plaintiffs anticipated that a certification motion would be highly contested, with Shkreli attacking the fraud-on-the-market presumption. Plaintiffs faced a difficult path through discovery, with both Shkreli and his corporate lawyer incarcerated, after which they would have had to survive Shkreli's motion for summary judgment, prove their claims at trial, and successfully overcome likely appeals. The risk of continuing litigation against Shkreli was exacerbated by the possibility that his insurance policy and personal assets would be depleted before a judgment could be secured, especially considering his criminal conviction.

3. Counsel's Fee Was Contingent And Carried A Financial Burden

A determination of a fair fee must consider its contingent nature: it is "an established practice in the private legal market" to reward attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases. *WPPSS*, 19 F.3d at 1299 (citing Richard Posner, *Economic Analysis of Law*, § 21.9, at 534-35 (3d ed. 1986)). In fact, contingent fees far exceeding the market value of the services if rendered on a non-contingent basis are accepted in the legal profession as a legitimate way of assuring competent representation for plaintiffs who could not afford to pay on an hourly basis, regardless of whether they win or lose. *Id.*; *see also Stanger v. China Elec. Motor, Inc.*, 812 F.3d 734, 741 (9th Cir. 2016) ("Risk multipliers incentivize attorneys to represent class clients, who might otherwise be denied access to counsel, on a contingency basis."). Courts have consistently recognized that the risk of receiving little or no recovery is a factor in considering an award of attorneys' fees. *Vizcaino*, 290 F.3d at 1050.

The contingent nature of the fee supports a 25% award. Counsel made a substantial outlay of both time and money, all while facing the very real risk of recovering nothing. It is hardly uncommon for a plaintiff's counsel to remain unpaid in cases such as this one after having expended

1 thousands of hours and large sums of money.³ Since the commencement of this Action more than
 2 two years ago, Plaintiffs' Counsel has received no compensation for the time and effort expended
 3 litigating the claims against Shkreli. Additionally, although reimbursement was not assured,
 4 Plaintiffs' Counsel advanced \$45,165.72 in expenses to date toward the prosecution of claims
 5 against Shkreli for the benefit of the Settlement Class. *See* Tuccillo Dec. ¶30; Glancy Dec. ¶8;
 6 Federman Dec. ¶8. Only a portion of those outlays were reimbursed as part of the Partial Settlement.
 7 *See* Dkt. No. 101. In truth, any fee award or expense reimbursement to Plaintiffs' Counsel has
 8 always been at risk and completely contingent on the result achieved and on this Court's exercise
 9 of its discretion in making any award.

10 Thus, this factor militates in favor of the requested attorneys' fees and expenses. *See*
 11 *Heritage Bond*, 2005 WL 1594403, at *21 (risk of non-payment or reimbursement of expenses was
 12 a factor weighing strongly in favor of counsel's requested fee award); *Vizcaino*, 290 F.3d at 1050
 13 (counsel's representation of the class on a contingent basis was relevant in determining reasonable
 14 fees); *Omnivision*, 559 F. Supp. 2d at 1047 (counsel's substantial outlay of time without receiving
 15 compensation and advancement of expenses supported requested fee award); *Immune Response*,
 16 497 F. Supp. 2d at 1175-76 (counsel's representation on contingency supported requested fee).

17 4. Plaintiffs' Counsel Devoted Exceptional Skill And Quality Of Work

18 The "prosecution and management of a complex [] class action requires unique legal skills
 19 and abilities" that are to be considered when evaluating fees. *Omnivision*, 559 F. Supp. 2d at 1047;
 20 *Knight*, 2009 WL 248367, at *6 (same). "The difficulty of securities litigation generally –

21
 22 ³ It bears noting that many securities cases have been lost at trial, on post-trial motions, or on appeal.
 23 *See, e.g., Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215 (10th Cir. 1996) (overturning plaintiffs'
 24 verdict obtained after two decades of litigation); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d
 25 263 (2d Cir. 1979) (reversing \$87 million judgment after trial). For example, in *In re JDS Uniphase*
 26 *Corp. Securities Litigation*, the jury issued a verdict in favor of defendants after five years of
 27 litigation. No. C-02-1486-CW-EDL, 2007 WL 4788556 (N.D. Cal. Nov. 27, 2007). In *Hubbard v.*
 28 *BankAtlantic Bancorp, Inc.*, the jury issued a verdict on liability in favor of plaintiffs, but the
 Eleventh Circuit affirmed judgment as a matter of law against the plaintiffs for lack of proof of loss
 causation. 688 F.3d 713 (11th Cir. 2012). In *Backman v. Polaroid Corp.*, the class won a \$38
 million jury verdict (exclusive of prejudgment interest), and a motion for judgment *n.o.v.* was
 denied; however, on appeal, the judgment was reversed and the case dismissed, inflicting a total loss
 after ten years of active litigation. 910 F.2d 10 (1st Cir. 1990).

1 particularly the challenges presented by the PSLRA's pleading requirements – requires skilled
 2 counsel familiar with the relevant statutes and case law.” *Am. Apparel*, 2014 WL 10212865, at *22.
 3 It is important to reward skilled counsel for pursuing difficult cases because “the stated goal in
 4 percentage fee-award cases [is] of ‘ensuring that competent counsel continue to be willing to
 5 undertake risky, complex, and novel litigation.’” *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190,
 6 198 (3d Cir. 2000) (internal citation omitted).

7 Here, the quality of Lead Counsel's work in this case is reflected in the significant recovery
 8 obtained. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla. 1988) (“Perhaps
 9 no better indicator of the quality of representation here exists than the result obtained.”), *aff'd*, 899
 10 F.2d 21 (11th Cir. 1990). Given the complexity of the pleading and proof of issues presented in this
 11 Action, including falsity, scienter, reliance, loss causation, damages, and control of KaloBios, only
 12 skilled, diligent counsel could have obtained such a favorable recovery. From the outset, Lead
 13 Counsel has aggressively sought to obtain factual support for Plaintiffs' claims from all available
 14 sources, including, without limitation, from the criminal and civil proceedings against Shkreli and
 15 from confidential witnesses with knowledge of the relevant events. *See Tuccillo Dec.*, ¶4. Lead
 16 Counsel also steadfastly researched, gathered, and argued the legal authorities supporting Plaintiffs'
 17 claims against Shkreli. *See, e.g.*, Plaintiffs' Opposition to Shkreli's First MTD (Dkt. No. 65);
 18 Plaintiffs' Opposition to Shkreli's Second MTD (Dkt. No. 112). Ultimately, the facts identified and
 19 legal arguments raised proved valuable and were a major reason why Lead Counsel were able to
 20 achieve this Settlement. The skill demonstrated by Plaintiffs' Counsel supports the requested fee.

21 “The experience of counsel is also a factor in determining the appropriate fee award.”
 22 *Heritage*, WL 1594389, at *12 (citing *In re Gen. Instrument Sec. Litig.*, 209 F. Supp. 2d 423, 432-
 23 33 (E.D. Pa. 2001) (where “the court justified its fee award of one-third of a common fund based
 24 in part on the experience of counsel in litigating securities class actions.”); *In re Pub. Serv. Co. of*
 25 *N. M.*, No. 91-0536M, 1992 WL 278452, at *8 (S.D. Cal. July 28, 1992) (experience in complex
 26 class actions weighed in favor of fee award of one-third of common fund). All Counsel are
 27 experienced and skilled practitioners in the securities litigation field. *See Tuccillo Dec.*, Exh. 4
 28 (Firm Résumé); Glancy Dec., Exh. 4 (Firm Résumé); Federman Dec., Exh. 4 (Firm Résumé).

Also, the quality and vigor of opposing counsel is relevant in evaluating the quality of the services rendered by Lead Counsel. *See, e.g., In re Equity Funding Corp. of Am. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (“[P]laintiffs’ attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly.”); *In re Warner Commc’ns Sec. Litig.*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) (“The quality of opposing counsel is also important in evaluating the quality of plaintiffs’ counsels’ work.”), *aff’d*, 798 F.2d 35 (2d. Cir. 1986). Defense counsel in this case are prominent attorneys from Fox Rothschild LLP, who have substantial experience in defending securities class actions and who vigorously defended this Action and persuaded the Court to grant Shkreli’s first motion to dismiss.

5. The Negative Lodestar Multiple Amply Supports The Fee Request

As a “cross-check” on the reasonableness of a requested fee award, courts often compare counsel’s “lodestar” — a compilation of the hours performed at the various rates charged by the professionals providing the services herein — with the fee request made under the percentage-of-the-fund method, and “the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted . . . [and] may provide a useful perspective on the reasonableness of a given percentage award.” *Vizcaino*, 290 F.3d at 1050.

In securities class actions, it is common for lodestar figures to be adjusted upward by a sizeable multiplier to reflect a variety of factors, including the complexity of the case and the risks assumed by counsel. For example, the court in *Vizcaino* approved a fee representing a multiple of 3.65 times counsel’s lodestar. *Id.* at 1051-52 (listing 23 shareholder settlements and the multipliers for each, in which the average multiplier is 3.28 and stating that “courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases”). Indeed, the Ninth Circuit has recognized that the “[risk multiplier] incentive is especially important in securities cases.” *Stanger*, 812 F.3d at 741.

Here, the requested percentage fee actually amounts to a ***negative multiplier on Counsel’s lodestar***, no matter how analyzed, and so the lodestar cross-check confirms that the fee requested by Plaintiffs’ Counsel is more fair and reasonable. The lodestar cross-check supports the award, as a negative multiplier results either when the post-Partial-Settlement-only lodestar (\$377,634.50) is

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1 compared against the currently-requested \$375,000 award (a 0.99 multiplier) or when the total
 2 aggregate lodestar to date (\$1,176,579.50) is compared against the total fee awards from both
 3 settlements (\$813,680.68) assuming the instant Fee Motion is granted (a 0.69 multiplier). *See*
 4 Tuccillo Dec., ¶¶26-29, Exhs. 1 (Total Lodestar) and 2 (Post-Partial-Settlement Lodestar); Glancy
 5 Dec., ¶¶4-7, Exhs. 1 (Total Lodestar) and 2 (Post-Partial-Settlement Lodestar); Federman Dec., ¶¶4-
 6 7, Exhs. 1 (Total Lodestar) and 2 (Post-Partial-Settlement Lodestar). Moreover, Plaintiffs’
 7 Counsel’s lodestar does not even include time and effort that they will continue to devote to the
 8 Action on behalf of the Settlement Class by, for example, directing the claims-administration
 9 process and final distribution. Nor does the lodestar include the time spent on this fee application.

10 Thus, under any calculation, the lodestar cross-check demonstrates that the requested fee is
 11 unquestionably reasonable compared to both the 3.65 multiplier approved in *Vizcaino* and the 1-4
 12 range of frequently awarded multipliers discussed in *Vizcaino* and in other Ninth Circuit cases. *See*
 13 *Vizcaino*, 290 F.3d at 1051 n.6; *Van Vranken*, 901 F. Supp. at 298 (“Multipliers in the 3-4 range are
 14 common in lodestar awards for lengthy and complex class action litigation.”); *Destefano v. Zynga,*
 15 *Inc.*, No. 12-CV-04007-JSC, 2016 WL 537946, at *21 (N.D. Cal. Feb. 11, 2016) (“In securities class
 16 actions in particular, courts have applied multipliers ranging from 1.25 up to 4.”) (collecting cases).
 17 The scant negative multiplier represented here is especially reasonable, considering that the recovery
 18 achieved for the Settlement Class, as a percentage of maximum damages, is substantially above the
 19 median for comparable securities fraud class actions, as discussed herein.

20 6. The Reaction To The Fee Request Was Overwhelmingly Positive

21 The Summary Notice was published on *Globe Newswire* on April 19, 2018, and more than
 22 21,400 Short-Form Notices were mailed to potential Settlement Class Members, both directing them
 23 to the Claims Administrator’s website, where they could obtain the Settlement papers, including the
 24 Long-Form Notice, Claim Form, and Stipulation. *See* Evans Dec. ¶¶7, 9-10. This robust process
 25 informed potential Settlement Class Members that Lead Counsel would request a fee award up to
 26 25% of the Settlement Fund. *See id.* ¶¶7,9-10, Exh. C (Long-Form Notice), at 2. ***No objection to***
 27 ***the fee has been filed to date nor has there been any request for exclusion.*** *Id.* ¶¶12-13. This
 28 overwhelmingly positive reaction supports Plaintiffs’ Counsel’s fee request: courts have recognized
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1 that “[t]he presence or absence of objections from the class is also a factor in determining the proper
 2 fee award.” *Heritage Bond*, 2005 WL 1594389, at *15-16 (holding that “the lack of significant
 3 objections to the requested fees justifies an award of one-third of the Settlement Fund[,]” particularly
 4 where the number of objections to the fee was “remarkably small given the wide dissemination of
 5 notice”); *Cullen v. Whitman Med. Corp.*, 197 F.R.D. 136, 149 (E.D. Pa. 2000) (finding that only one
 6 objection despite mailed notices to over 5,250 potential class members “weighs in favor of
 7 approving the fee petition”).

8 **C. Plaintiffs’ Counsel’s Expenses Were Reasonable And Necessary**

9 Traditionally, Ninth Circuit “courts have awarded expenses from the litigation, in addition
 10 to a percentage of the fund.” *In re Businessland Sec. Litig.*, No. C-90-20476-RFP, 1991 WL 427887,
 11 at *2 (N.D. Cal. June 14, 1991). It is well established that counsel who create a common fund are
 12 entitled to the reimbursement of expenses that they advanced for the benefit of the class. *Harris v.*
 13 *Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994) (plaintiff “may recover as part of the award of attorney’s
 14 fees those out-of-pocket expenses that ‘would normally be charged to a fee paying client.’”) (internal
 15 citation omitted). Courts grant such requests for reimbursement of expenses where “class counsel
 16 incurred out-of-pocket costs including: (1) filing fees; (2) copying, mailing, faxing and serving
 17 documents; (3) conducting depositions and obtaining deposition transcripts; (4) conducting
 18 computer research; (5) travel to depositions, hearings, and mediation sessions; (6) expert fees; and
 19 (7) mediation expenses.” *Milligan v. Toyota Motor Sales, U.S.A., Inc.*, No. C 09-05418 RS, 2012
 20 WL 10277179, at *9 (N.D. Cal. Jan. 6, 2012); *see also Alvarado v. Nederend*, No. 08-cv-01099
 21 OWW DLB, 2011 WL 1883188, at *10 (E.D. Cal. Jan. May 17, 2011); *In re Magsafe Apple Power*
 22 *Adapter Litig.*, No. 09-CV-01911-EJD, 2015 WL 428105, at *15 (N.D. Cal. Jan. 30, 2015)
 23 (approving reimbursement of \$100,000 in expenses that included “cost of experts and consultants,
 24 computerized research such as the use of Lexis and Westlaw, travel expenses such as airfare, meals,
 25 lodging and transportation, and costs such as photocopies, postage, filing fees, and telephone
 26 charges.”).

27 Counsel incurred additional unreimbursed out-of-pocket expenses of \$19,041.70 in
 28 prosecuting this Action, over and above those previously reimbursed via the earlier Partial
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Settlement with the non-Shkreli Defendants, a large portion of which were the costs of mediation with Defendant Shkreli. *See* Tuccillo Dec., ¶¶30-31, Exh. 3 (Expenses); Glancy Dec., ¶¶8-9, Exh. 3 (Expenses); Federman Dec., ¶¶8-9, Exh. 3 (Expenses). Because these expenses were incurred with no guarantee of recovery, Plaintiffs' Counsel had a strong incentive to keep them as low as reasonably possible – and did. Indeed, they are far below the \$50,000 estimate contained in the Notice, which generated *no objections* from the Settlement Class. *See* Evans Dec. ¶13, Exh. C (Long-Form Notice), at 2. Each of the expenses for which Plaintiffs' Counsel seeks reimbursement was necessary to the successful prosecution of this Action and is the type of expense that would have been billed to a paying client. Accordingly, their reimbursement is reasonable and appropriate.

D. The Requested Compensatory Awards To Plaintiffs Should Be Approved

Plaintiffs also respectfully request that the Court award them \$500 each (or \$2,500 in total) in connection with their representation of the Settlement Class. “[N]amed plaintiffs, as opposed to designated class members who are not named plaintiffs, are eligible for reasonable incentive payments.” *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003). Plaintiffs have devoted time representing the Settlement Class throughout the Action and have fulfilled their oversight obligations admirably. Plaintiffs submitted declarations setting forth their participation in the Action, including their time and efforts devoted to: (1) reviewing complaints and motion papers; (2) overseeing the Action; (3) communicating with counsel about the Action; and (4) considering its potential resolution, articulating settlement authority, and approving the Settlement. *See* Fatema Dec. ¶¶5, 7; Ingram Dec. ¶¶5, 7; Gudlavenkatasiva Dec. ¶¶5, 7; Saifulislam Dec. ¶¶5, 7; Isensee Dec. ¶¶5, 7; Tuccillo Dec. ¶33. Absent the participation and oversight of Plaintiffs, the Partial Settlement would not have been achieved.

The requested incentive award of \$500 each is fair and reasonable. Indeed, courts routinely approve incentive awards of substantially more. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving incentive awards of \$5,000 each to two class representatives in securities-class-action settlement of \$1.725 million); *In re LinkedIn User Privacy Litig.*, 309 F.R.D. 573, 592 (N.D. Cal. 2015) (recognizing that “a \$5,000 incentive award is presumptively reasonable”); *Buccellato v. AT&T Operations, Inc.*, No. C10-00463-LHK, 2011 WL MOTION FOR AWARD OF ATTORNEYS’ FEES, REIMBURSEMENT OF EXPENSES, AND COMPENSATORY AWARDS FOR PLAINTIFFS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF – Case No. 5:15-cv-05841-EJD

4526673, at *4 (N.D. Cal. June 30, 2011) (awarding \$20,000 to lead plaintiff and \$5,000 to class representatives). *See also, e.g., In re Veritas Software Corp. Sec. Litig.*, 396 F. App'x 815, 817 (3d Cir. 2010) (awarding \$15,000 for each lead plaintiff); *In re Giant Interactive Grp., Inc. Sec. Litig.*, 279 F.R.D. 151, 166 (S.D.N.Y. 2011) (awarding \$10,000 as an incentive and for lost time); *In re Xcel Energy, Inc., Sec., Derivative & "ERISA" Litig.*, 364 F. Supp. 2d 980, 1000 (D. Minn. 2005) (approving a \$100,000 award to lead plaintiffs and noting that lead plaintiff awards are important because they further "the important policy role [lead plaintiffs] play in the enforcement of the federal securities laws on behalf of persons other than themselves").

IV. CONCLUSION

Lead Counsel, with the support and assistance of the other Plaintiffs' Counsel, and under the supervision of Plaintiffs, undertook substantial risk that no recovery would ever be achieved, incurred a sizeable *negative* lodestar in prosecuting this Action against Shkreli on behalf of the Settlement Class, and achieved a favorable recovery for Settlement Class Members, despite KaloBios's bankruptcy and Shkreli's conviction and incarceration. Accordingly, Plaintiffs and their Counsel respectfully request that this Court award the requested fees. Additionally, because the expenses that Plaintiffs' Counsel advanced for the benefit of the Settlement Class were reasonably necessary to prosecute this Action and were the type usually billed to clients outside of a contingency-payment arrangement, Plaintiffs and their Counsel also respectfully request that the Court grant reimbursement of the identified expenses. Finally, Plaintiffs and their Counsel respectfully request that Plaintiffs be awarded \$500 each for their efforts expended in this Action and without whose participation the Settlement with Defendant Shkreli would not have been achieved.

1 Dated: July 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent to those indicated as non-registered participants on July 5, 2018.

/s/ Matthew L. Tuccillo

Matthew L. Tuccillo